Filed 11/24/08 P. v. Sherman CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. PIERCE JOSEPH SHERMAN, Defendant and Appellant.	B199710 (Los Angeles County Super. Ct. No. BA303980)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anita H. Dymant, Judge. Affirmed.

Alan Siraco, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Pierce Joseph Sherman appeals from the judgment entered following his conviction by a jury on one count of attempted willful, deliberate and premeditated murder, one count of shooting at an occupied vehicle and one count of permitting another to shoot from a vehicle. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Charges*

Sherman was charged by information with attempted willful, deliberate and premeditated murder (Pen. Code, §§ 664, 187, subd. (a)) (count 1),[1] shooting at an occupied motor vehicle (§ 246) (count 2) and permitting another to shoot from a vehicle (§ 12034, subd. (b)) (count 3). The information specially alleged as to count 1 that a principal in the commission of the offense was armed with a handgun pursuant to section 12022, subdivision (a)(1). The information also specially alleged Sherman had suffered eight prior serious felony convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)) and section 667, subdivision (a)(1), and had served several separate prison terms for prior felony convictions (§ 667.5, subd. (b)). Sherman pleaded not guilty and denied the special allegations.

2. *Instructions to the Prospective Jurors Before Voir Dire*

Prior to voir dire of the prospective jurors the court advised the venire of the crimes charged and explained some general legal principles, including the presumption of innocence and reasonable doubt. The court stated, "To these charges and special allegations the defendant has pleaded not guilty, and that's, of course, why we're here for trial, and you must always remember that the fact that a defendant is charged with a crime or more than one crime is never to be considered proof that he committed the crime. So being charged with a crime doesn't prove that you committed the crime. It's simply a statement of what you are charged with. And let me illustrate what I mean by that. Let me give you an example of what that means. What does it mean? Being charged with a crime isn't proof that you did the crime. Well, suppose I were to make

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[1] Statutory references are to the Penal Code unless otherwise indicated.

everyone happy and say, okay, trial is over, 12 jurors, please go back and deliberate on this case, give me a verdict. You've met the parties. You know what the defendant is charged with. Good enough. Why don't you go back there and tell me what the verdict is. If that sounds silly it is. That's not the way we do trials, but if I were to ask you to decide the case right now based on what you have heard so far, the law would only allow you to reach one conclusion. You could only reach one lawful verdict, and that would be to find the defendant not guilty. Why is that? It's because you haven't heard any evidence in the case yet. You haven't heard any evidence at all. All you have heard is that the defendant is charged with these crimes, and since being charged with a crime isn't proof, it isn't evidence, that is why you would have to find the defendant . . . not guilty. . . . Not guilty if I asked you to decide the case right now. And as I said, that's not the way we do it, we ask you to decide the case after you have heard the evidence, and then your decision will be, well, was there enough evidence, and we'll get to that in a moment. Was there enough evidence for that to meet the standard."

After providing the panel with additional information about the case, the trial court resumed explaining the "basic rules that apply in all criminal cases . . . ." The court stated its previous "example of how you would have to vote if you decided the case right now . . . is probably something you have heard about before. It's called the presumption of innocence. Every defendant begins a criminal trial presumed innocent. It's kind of like beginning with a blank slate. Nothing is written on it yet. And if that is all you had, that's why you would have to find the defendant not guilty because he starts the trial presumed innocent."

The court further explained that another rule, following from the presumption of innocence, "talks about how much evidence it takes to overcome the presumption of innocence so that a jury could find a defendant guilty, and that is proof beyond a reasonable doubt." To define reasonable doubt, the court read, in part, from the governing jury instructions (Judicial Council of California Criminal Jury Instructions (CALCRIM) No. 220), "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible

doubt because everything in life is open to some possible or imaginary doubt." In advising the potential jurors the People have the burden of proving the defendant guilty beyond a reasonable doubt, the court in part stated, "The defendant doesn't have any burden. He doesn't have to prove that he's not guilty. He doesn't have to prove that he's innocent. It's the prosecution's job to prove, if they can, that the defendant is guilty beyond a reasonable doubt. So that's the third rule, that the prosecution has the burden of proof and it never moves over to the defendant. Because of that, a defendant never has any obligation to call any witnesses or to present any evidence."

Among other legal principles, the court also advised the jury, "In making your decision, there are certain things that you can't allow to affect you, things like prejudice against a defendant or sympathy for him, can't play any part in your decision. You can't be influenced by public opinion in general or by an opinion of friends or family in particular. You can't decide this case based on speculation, and speculation just means the what-if kind of way of thinking, well, what if this happened, well, what if that happened. If there's evidence for it, you may consider other pieces of information, but you can't just go off and speculate and guess and what if Martians landed and all that stuff, only based on the evidence that is presented here in court."

3. *Summary of the Evidence Presented at Trial*

a. *The People's case*

Jason Langaigne testified he had been visiting his friend Jennifer in her apartment on May 7, 2006. At approximately 11:20 a.m. he left and got in his car, which was parked in an alley behind the apartment building. While he was plugging his cell phone charger into the phone, a dark-colored sports utility vehicle (SUV), heading in the opposite direction, parked to the front and side of him. The front passenger door opened, and a man got out with a handgun. As Langaigne tried to shift his car into drive, the shooter fired multiple shots, hitting him in the right and left legs and, as Langaigne covered his face, in the elbow, wrist and finger.

Langaigne was finally able to drive away and went to the front of the apartment building. Jennifer helped Langaigne to her apartment where he was subsequently

attended to by paramedics. Langaigne was in the hospital for about a month; his injuries required nine surgeries. Langaigne testified he did not see either the shooter or the driver and did not know or recognize Sherman.

James Mickelbury, Jennifer's brother, lived with her and their parents in the apartment. He testified he had heard a car playing loud music as it drove into the alley. As he looked out a window overlooking the alley to see if the car belonged to one of his friends, Mickelbury saw a man begin shooting at Langaigne from inside a red SUV; the man continued shooting as he got out of the vehicle. Mickelbury wrote down the license number and later gave it to the police.

Frank Scott testified he was watching television on the second floor of his home when he heard about six gunshots. He went to the window and saw a red SUV at the end of the alley, which was about 50 feet away. As the vehicle turned right, Scott saw Sherman, whom he positively identified at trial, through the open driver's side window. Sherman was driving the SUV.

Alex Lizarraga, a regional security manager for Vanguard Car Rental USA Inc., operator of Alamo Rent a Car and National Car Rental, testified that on May 7, 2006 Sherman was a shift manager at the Los Angeles International Airport National/Alamo lot and worked from 2:30 p.m. to 11:00 p.m. All managers were allowed to use a lot rental car as a personal vehicle. On May 6, 2006 at 12:35 a.m. Sherman checked out a burgundy Buick Rainier SUV that had the same license number as Mickelbury had given to the police. Sherman returned the SUV on May 8, 2006 at 12:57 a.m.

On June 6, 2006 Los Angeles Police Detective Kelly Clark arrested Sherman at his home. Later, as Clark and her partner walked Sherman from a holding cell to an interview room, Sherman asked why he was there and what was going on. As Clark tilted a photograph she was carrying of the Buick Rainier toward Sherman, she stated it was regarding a Buick Rainier he had checked out from the car rental agency. Sherman responded, "Yeah, I drove it. I check out lots of cars."

b. *Sherman's defense*

Sherman did not testify. Cindy Grace testified she was Sherman's girlfriend. During the morning of May 7, 2006 she and Sherman were out looking at apartments. Sherman was driving an SUV, but she did not recall the type or color.

4. *The Predeliberation Instructions on the Presumption of Innocence and Reasonable Doubt*

Following the evidentiary presentations by the People and Sherman and prior to closing argument, the trial court instructed the jury concerning the general legal concepts governing its deliberation and the elements of the crimes with which Sherman was charged. In particular, the court, using CALCRIM No. 220, instructed, "The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

The court also instructed the jury with CALCRIM No. 222, advising it, in part, "You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom. [¶] 'Evidence' is the sworn testimony of witnesses, the exhibits received into evidence, and anything else I told you to consider as evidence."

5. *The Jury Verdict and Sentencing*

The jury found Sherman guilty of attempted willful, deliberate and premeditated murder, shooting at an occupied motor vehicle and permitting another to shoot from a vehicle. The jury also found true the special allegation as to count 1 that a principal was armed with a handgun. In a bifurcated trial Sherman admitted the prior conviction allegations. The trial court sentenced Sherman to an aggregate state prison term of 36 years to life: 25 years to life for attempted murder (as a third strike), plus 10 years for the two prior serious felony convictions brought and tried separately within the meaning of section 667, subdivision (a)(1), and one year for the principal-armed enhancement. The court imposed and stayed pursuant to section 654 a 36-years-to-life term for count 2, as well as a 26-years-to-life term for count 3. The court dismissed the prior prison term enhancements pursuant to section 1385.

CONTENTIONS

Sherman contends the trial court erred in instructing the venire before jury selection the presumption of innocence is like a "blank slate" and not to engage in "what if" speculation; there is no substantial evidence of premeditation and deliberation; and the court erred in prohibiting Sherman from introducing evidence prosecution witness Frank Scott had previously been convicted of a crime involving moral turpitude.

DISCUSSION

1. *The Trial Court Did Not Err in Instructing the Prospective Jurors*

a. *The court's reference to the presumption of innocence as a "blank slate" did not alter the People's burden of proof*

"The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution protect a criminal defendant from conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he or she is charged." (*People v. Mayo* (2006) 140 Cal.App.4th 535, 540-542, citing *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 [113 S.Ct. 2078, 124 L.Ed.2d 182].) "The 'presumption of innocence' -- a 'shorthand description of the right of the accused to "remain inactive and secure"' until the People have met their burden of proof -- is

inherent in the reasonable doubt standard. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 483 [98 S. Ct. 1930, 56 L.Ed.2d 468] (*Taylor*); see *ibid.* [‘“[t]o say . . . that the opponent of a claim or charge is presumed not to be guilty is to say in another form that the proponent of the claim or charge must evidence it”’ in accordance with the requisite burden of proof].) Yet, while the presumption of innocence and the People’s burden of proof are logically similar, the courts and legal scholars recognize that, for the lay juror, the presumption of innocence may convey an additional caution, admonishing jurors to ‘“put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced.”’ (*Taylor*, at p. 485, quoting 9 J. Wigmore, Evidence (3d ed. 1940) § 2511, p. 407.)” (*Mayo*, at pp. 542-543.)

CALCRIM No. 220 instructs the jury on the reasonable doubt standard. Historically, although no particular words are required to instruct the jury on the standard, trial courts have been advised against attempting to explain it beyond the language provided in the approved jury instructions. (*People v. Freeman* (1994) 8 Cal.4th 450, 503.) “This is not because the instruction cannot be improved today. . . . Rather, it is because varying from the standard is a ‘perilous exercise.’” (*Id.* at pp. 503-504.) Indeed, if viewing a modified reasonable doubt instruction in the context of the charge as a whole there is a reasonable likelihood a juror understood the court’s amplification to lessen the prosecution’s burden of proof, reversal is required. (See *Victor v. Nebraska* (1994) 511 U.S. 1, 5 [114 S.Ct. 1239, 127 L.Ed.2d 583] [no particular words required to advise jury of government’s burden of proof; “[r]ather, ‘taken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury’”] [first bracket added]; *People v. Mayo*, *supra*, 140 Cal.App.4th at p. 542 [“while an instruction that lowers the People’s burden of proof or detracts from the heavy burden suggested by use of the term ‘reasonable doubt’ is federal constitutional error requiring reversal per se [citation], omission of a constitutionally acceptable definition of reasonable doubt is federal constitutional error only when the instructions given to the jury, taken as a whole, fail to otherwise adequately convey the concept of reasonable

doubt"]; see also *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248 [""correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction""].)

Sherman contends the trial court's reference to a "blank slate" while explaining the presumption of innocence to prospective jurors prior to voir dire was reversible error because it replaced an affirmative state of innocence as a starting point with a neutral one that impermissibly placed a burden on the defendant to overcome any evidence the prosecution introduced.[2] Sherman's interpretation of the trial court's reference to a blank slate and his argument it somehow lowered the People's burden of proof are unpersuasive. Viewed in context, the comment was plainly intended to illustrate the court's admonition, based on CALCRIM No. 220, the jury was not to infer guilt from the fact the defendant had been arrested, charged with a crime and brought to trial. As such, it reinforced the presumption of innocence -- advising the prospective jurors that presumption stood unchallenged unless and until the People presented evidence (wrote on the blank slate) that demonstrated his guilt beyond a reasonable doubt.

In any event, the comment made well before the start of trial was neither particularly illuminating nor damaging. (Cf. *People v. Medina* (1995) 11 Cal.4th 694, 741 ["as a general matter, it is unlikely that errors or misconduct occurring during voir dire questioning will unduly influence the jury's verdict in the case"].) The reference was fleeting -- buried in a repetitive explanation to the prospective jurors regarding the presumption of innocence and the prosecution's burden to prove guilt beyond a reasonable doubt. Moreover, the empanelled jury was later instructed on the general

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[2] Although Sherman failed to object to the court's pre-voir dire reference to a blank slate, any error in this preinstruction arguably affects his substantial right. Therefore, no objection was necessary to preserve the issue for appeal. (§ 1259 ["appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"]; see *People v. Johnson* (2004) 119 Cal.App.4th 976, 984 [rejecting argument defendant had forfeited right to appellate review of reasonable doubt instruction by failing to object].)

reasonable doubt standard with CALCRIM No. 220, as well as with the CALCRIM instructions explaining that each element of the various offenses had to be proved beyond a reasonable doubt. Viewed in context of the instructions as a whole, there is simply no reasonable likelihood a juror may have misunderstood the trial court's reference to a blank slate as undermining the fundamental constitutional right that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial," the importance of which "an instruction on the presumption is one way of impressing upon the jury . . . ." (*Taylor*, *supra*, 436 U.S. at p. 485; cf. *People v. Espinoza* (1992) 3 Cal.4th 806, 823-824 ["there is no reasonable likelihood that the jury would have understood the trial court's brief and apparently inadvertent misstatement to mean that the defendant had the burden of proving, beyond a reasonable doubt, that he was innocent of the charged offenses of murder"].)

b. *The court's admonishment against "what if" speculation did not undermine the reasonable doubt standard*

Sherman also contends the trial court's preinstruction to the prospective jury panel before voir dire that jurors must not engage in "what if" speculation was reversible error because, although it may have permissibly told the jurors to decide the case based only on evidence introduced at trial, it erroneously precluded them from entertaining reasonable doubt based on the absence of evidence. According to Sherman, therefore, the preinstruction comment undermined the reasonable doubt standard.

Viewed in the context of all the instructions given, it is not reasonably likely a juror understood the court's comment as Sherman suggests. Consistent with CALCRIM Nos. 200 and 222, paraphrased in the court's initial preinstructions and given at the close of evidence, the court was simply instructing the potential jurors they must decide the facts in the case based only on the evidence presented at trial. (See *People v. Cain* (1995) 10 Cal.4th 1, 36 [jury instructions reviewed as whole to determine if there is reasonable likelihood jury understood the instructions to permit conviction on improper basis]; see

also *People v. Osband* (1996) 13 Cal.4th 622, 679 [appellate court reviews claim of ambiguity in instruction by determining whether, in light of all the instructions given, "'there is a reasonable likelihood that the jury construed or applied the challenged instruction[s] in an objectionable fashion'"].) Unlike *People v. McCullough* (1979) 100 Cal.App.3d 169, 182, in which the trial court had "misled the jury by telling it that the 'doubt must arise from the evidence,'" an error found to be harmless, the trial court here made no such misleading statement undermining the reasonable doubt standard. (Cf. *People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1509-1510 [CALCRIM No. 220 requiring jurors to determine guilt by considering all evidence presented at trial did not improperly prohibit jurors from considering prosecution's lack of evidence]; *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1156-1157 [CALCRIM No. 220 requiring the jury "'to compare and consider all the evidence'" does not "impermissibly shift[] the burden of proof to the defendant by allowing the jury to hold against the defense the absence of defense evidence"].)

2. *Substantial Evidence Supports the Jury's Finding the Attempted Murder Was Willful, Deliberate and Premeditated*

"Like first degree murder, attempted first degree murder requires a finding of premeditation and deliberation." (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1223-1224.) "'"Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. [Citations.] "The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'"'" (*People v. Young* (2005) 34 Cal.4th 1149, 1182.)

In *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*) the Supreme Court articulated "guidelines to aid reviewing courts in analyzing the sufficiency of the evidence to sustain findings of premeditation and deliberation." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.) Generally, evidence of planning, motive and method of killing is pertinent to the determination of premeditation and deliberation. The *Anderson*

guidelines, however, are descriptive, not normative; and the factors "are not a sine qua non to finding first degree premeditated murder, nor are they exclusive." (*Ibid*.) For example, "an execution-style killing may be committed with such calculation that the manner of killing will support a jury finding of premeditation and deliberation, despite little or no evidence of planning and motive." (*People v. Lenart* (2004) 32 Cal.4th 1107, 1127; accord, *People v. Tafoya* (2007) 42 Cal.4th 147, 172.)

Relying on the *Anderson* factors, Sherman argues there was no evidence of planning or motive and nothing could be reasonably inferred from the manner of the shooting, which was not a particular and exacting method to kill.[3] The jury, however, could have reasonably inferred both that the shooter coldly and calculatedly intended to

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[3] In reviewing a challenge to the sufficiency of the evidence, we "consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432; see *People v. Staten* (2000) 24 Cal.4th 434, 460; *People v. Hayes* (1990) 52 Cal.3d 577, 631.) Our sole function is to determine if any rational trier of fact could have found the essential elements of the crime present beyond a reasonable doubt. (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The Supreme Court has held, "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*Bolin*, at p. 331.)

"Substantial evidence" in this context means "evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *People v. Hill* (1998) 17 Cal.4th 800, 848-849 ["'"[w]hen the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence -- i.e., evidence that is credible and of solid value -- from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt"'"].) "Although the jury is required to acquit a criminal defendant if it finds the evidence susceptible of two reasonable interpretations, one of which favors guilt and the other innocence, it is the jury, not the appellate court, which must be convinced of his guilt beyond a reasonable doubt." (*People v. Millwee* (1998) 18 Cal.4th 96, 132.)

shoot Langaigne and that Sherman knew of his purpose and intended to facilitate it from the manner in which Sherman drove the SUV. The evidence supported the conclusion Sherman deliberately drove into an alley and parked the SUV next to Langaigne's car. Scott testified the alley was not used as shortcut between two busy streets.[4] Sherman's actions thus permitted the shooter to begin firing from the SUV and to continue firing six to eight shots at a relatively close range after he got out of the vehicle.[5] (Cf. *People v. Morris* (1988) 46 Cal.3d 1, 23 ["when one plans to engage in illicit activity at an isolated location during the early morning hours, and one brings along a deadly weapon which is subsequently employed, it is reasonable to infer that one 'considered the possibility of homicide from the outset'"] disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543-545, fns. 5 & 6.; *People v. Wright* (1985) 39 Cal.3d 576, 594 ["[Defendant's] statements further indicated that he fired once and began to walk toward the victim as he continued to fire his weapon: defendant stated he 'went just like Wyatt Earp and shot him.' The fact that defendant shot his victim four times at close range could well support an inference by the jury that the manner of killing was 'particular and exacting.'"].) That Langaigne was simply sitting in his car in the alley and did nothing to provoke the shooting also suggests it was not simply a spontaneous act of violence. (See *People v. Miller* (1990) 50 Cal.3d 954, 993 ["lack of provocation by the victims similarly

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[4] Although Langaigne, who did not live in the area, had testified the alley was used as a shortcut between two busy streets, the jury was entitled to give more weight to the testimony of Scott, whose home overlooked the alley.

[5] Attempting to distinguish this case from *People v. Thomas* (1992) 2 Cal.4th 489, in which single, successful shots at point-blank range to the head of one victim and neck of another strongly suggested premeditation, Sherman argues the barrage of bullets inaccurately fired at close range suggests there was nothing exacting about the attempted murder of Langaigne. The evidence, however, supports a contrary conclusion: Langaigne testified he got shot in the elbow, wrist and finger when he covered his face. These shots were not haphazardly aimed; they were aimed directly at his head, which would have likely resulted in a murder with the hallmarks of an execution-style shooting -- evidence of which is strongly suggestive of premeditation -- but for Langaigne's defensive movements.

leads to an inference that the attacks were the result of a deliberate plan rather than a 'rash explosion of violence'"],

"Although the case is close, we are mindful that '"'[t]he test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt.'"'" (*People v. Wright*, *supra*, 39 Cal.3d at p. 592.) From this evidence the jury could have reasonably concluded beyond a reasonable doubt the shooter acted on a "'preexisting reflection rather than unconsidered or rash impulse'" (*People v. Sanchez* (1995) 12 Cal.4th 1, 33) and Sherman was aware of the shooter's purpose and intended to assist him.

3. *The Trial Court Did Not Err in Excluding Evidence of Scott's 1996 Felony Conviction*

Sherman sought to impeach Scott's eyewitness identification of him as the driver of the SUV with evidence Scott had been convicted of grand theft in 1996 for which he had served three days in jail and 36 months on probation. The court excluded the evidence, finding, although plainly a crime of moral turpitude admissible for impeachment purposes, the prior conviction was not sufficiently probative on the question of Scott's credibility because he had no record of any contact with law enforcement whatsoever (that is, Scott had remained not just free of conviction, but free of arrest) since the conviction 11 years earlier.

Although prior felony convictions involving moral turpitude are admissible to impeach a witness's testimony (Evid. Code, § 788), the trial court may exercise its discretion under Evidence Code section 352[6] to exclude such evidence if its probative value is substantially outweighed by its prejudicial effect or by the risk of confusing or misleading the jury. (*People v. Castro* (1985) 38 Cal.3d 301, 307.) Ordinarily, in exercising its discretion with respect to excluding a defendant's prior felony convictions,

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[6] Evidence Code section 352 states, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

the trial court should consider four factors identified by the Supreme Court in *People v. Beagle* (1972) 6 Cal.3d 441, 453: (1) the extent to which the prior conviction reflects adversely on an individual's honesty or veracity; (2) the nearness or remoteness in time of the prior conviction; (3) the similarity of the prior conviction to the charged offense; and (4) the likelihood the defendant will not testify out of fear of being prejudiced because of impeachment by the prior convictions. (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925; see also *People v. Green* (1995) 34 Cal.App.4th 165, 182-183.) When it is a witness other than the defendant whose prior convictions are being considered, factors 3 and 4 are inapplicable.

The trial court did not abuse its broad discretion in concluding Scott's prior conviction 11 years earlier was so remote it had virtually no bearing on his credibility and thus should be excluded. (*People v. Collins* (1986) 42 Cal.3d 378, 389 [trial court's discretion is "as broad as necessary to deal with the great variety of factual situations in which the issue arises, and in most instances the appellate courts will uphold its exercise whether the conviction is admitted or excluded"]; *People v. Wheeler* (1992) 4 Cal.4th 284, 296 ["[T]he latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues."]; see *People v. Karis* (1988) 46 Cal.3d 612, 637 [trial court's "exercise of discretion under Evid. Code section 352 will not be disturbed on appeal absent a clear abuse"].) The court in *People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 599, cited by Sherman, explained, "the proffered evidence must have more than slight relevancy to the issues presented."

The trial court concluded the evidence of Scott's prior conviction had no relevance on the question of his credibility in light of Scott's subsequent life free of crime -- a sound conclusion. The court's implicit finding the risks of possible jury confusion or the unnecessary consumption of trial time outweighed the probative value of this evidence was not a clear abuse of discretion. (See *People v. Tafoya, supra,* 42 Cal.4th at p. 174 ["a trial court has discretion to exclude evidence when its probative value is outweighed by concerns of undue prejudice, confusion, or consumption of time"].)

DISPOSITION

The judgment is affirmed.

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PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.